UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO BASIC RESEARCH LLC'S MOTION TO COMPEL

Complaint Counsel opposes Respondent Basic Research, LLC's *Motion To Compel* ("*Third Motion*"). With its *Third Motion*, Basic Research seeks an *Order* compelling Complaint Counsel to "provide answers or clearer answers" to 1) requests that seek information on a) matters not relevant to the pending proceedings and b) matters that the Court struck from the case, and 2) answers to a) questions of law and b) questions that Complaint Counsel has already answered. Respondents have failed to demonstrate that an *Order* compelling different answers is warranted. This Court should deny Respondent's motion.

BACKGROUND

On June 15, 2004, the Commission filed a *Complaint* alleging, *inter alia*, that Basic Research and other related companies and individuals (collectively, "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and falsely

represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. Throughout these proceedings, Respondents have professed that they lack sufficient information to determine the meaning of certain "key terms" in the *Complaint*. Respondents have filed numerous motions and discovery requests allegedly aimed at shedding light on terms such as "rapid" and "substantial" that appear in Respondents' own advertising, and the phrase "competent and reliable scientific evidence" which was defined in the *Notice Order* attached to the *Complaint*. Respondents have also sought to expand the scope of these proceedings by asserting numerous defenses that were either legally improper or factually insufficient. These so-called "Additional Defenses" were the subject of Complaint Counsel's *Motion to Strike Respondents' Additional Defenses*. On November 4, 2004, the Court granted Complaint Counsel's *Motion* in part emphasizing that the "the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act's prohibition against false and misleading advertising." Order on Complaint Counsel's Motion to Strike at 3.

On September 9, 2004, Basic Research served its *First Request for Admissions* seeking admissions on 47 separate requests. Complaint Counsel served its *Response* on September 24, 2004.[1] Our *Response* provided answers to proper requests and raised valid objections when necessary. For the requests at issue in Respondents' *Third Motion*, we asserted objections because Respondents were seeking admissions to matters of law and objections based upon relevance, overbreadth and vagueness. *See, e.g., Response* at 7-24 (and General Objections 1, 2 and 8 at pp. 1-3, 7-24).

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[1] These documents are attached to Respondent's *Third Motion*.

Thereafter, Complaint Counsel participated in two discovery conferences with Respondent in an attempt to prevent unnecessary motion practice and reach agreement on issues related to Basic Research's *First Requests for Admission*.[2] After the close of business on November 4, 2004, the same day that the Court issued its rulings denying Respondents' motion to compel and striking certain defenses, Respondent filed its third *Motion to Compel*. In its *Third Motion*, Basic Research demands that Complaint Counsel produce what it calls "clearer" answers to requests for admissions numbered 8-9, 22-24, 25-26, 27, 28, 29 and 38-39.

The specified requests for admissions are flawed because they seek information that are simply not relevant to these proceedings or because they seek admissions as to questions of law. As discussed below, Complaint Counsel has supplied proper answers to Respondents' requested admissions and has raised proper objections. The Court should reject Respondents' arguments and deny their third *Motion to Compel*.

DISCUSSION

A. Respondent Is Not Entitled to an *Order* Compelling Different Answers To its Requests for Admissions

Basic Research asserts that the discovery at issue in its *Third Motion* seeks to "identify and clarify the substance of the FTC's allegations" and "flesh out the bare bones of the FTC's notice pleading." *Third Motion* at pp. 3-5. These statements exemplify Respondents' liberal use of hyperbole. The Commission issued a detailed, seventeen-page, single-spaced *Complaint* that set forth specific allegations regarding the named Respondents as well as the products and

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[2] Complaint Counsel agreed to supplement its response to Request 34. Complaint Counsel's *Supplemental Response to Basic Research's First Requests for Admissions* is being submitted concurrently with this *Opposition*.

advertising practices at issue, and contained many illustrative examples of the advertising that conveyed the deceptive claims alleged in the *Complaint*.

The Court's recent rulings, issued before Respondent filed the instant motion, notified Respondents that "the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements" or the "Commissions decision to file the Complaint." Order on Complaint Counsel's Motion to Strike at 5; Order Denying Basic Research's Motion to Compel (both issued on November 4, 2004).[3] Moreover, the Court cautioned that even allowing certain defenses is *not* "an open invitation to needlessly confuse the issues, increase the scope of discovery, or prolong these proceedings." *Order on Complaint Counsel's Motion to Strike* at 7. However, even a cursory examination of the requests at issue reveal that they are yet another attempt to seek information on matters that are not relevant to whether Respondents violated the FTC Act's prohibition against false and misleading advertising. Respondent's *Third Motion* presents no valid arguments or case precedent requiring Complaint Counsel to supplement its responses to the requested admissions.

To the contrary, Complaint Counsel's responses meet the requirement of RULE 3.32 and our asserted objections are both proper and recognized by the pertinent case law. Accordingly, this Court should deny Respondent's *Third Motion*. RULE 3.32 provides that a party may serve a written "request for admission of any matters relevant to the pending proceedings set forth in the request that relate to statements or opinions of fact or of the application of law to fact." The responding party must provide a written answer or objection and the RULE specifies that "[i]f objection is made, the reasons therefor shall be stated." Further, the answer "shall specifically

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[3] Both *Orders* are attached as Exhibit A.

deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." *Id.* By its plain terms, the RULE (and its analogy in FEDERAL RULE OF CIVIL PROCEDURE 36) applies only to facts or the application of law to facts. Requests for admissions of law are improper and frustrate the purpose of the RULE. *See Williams v. Krieger*, 61 F.R.D. 142 (S.D.N.Y. 1973).

One purpose of requests for admission is to "narrow the issues for trial by relieving the parties of the need to prove facts that will not be disputed at trial and the truth of which can be easily obtained." *Aspen Technology, Inc.*, No. 9310, 2003 WL 2298178 (F.T.C. 2003); *General Motors*, 1977 FTC LEXIS 293, *3 (1977). *See also Trans Union Corp.*, 1993 FTC LEXIS 116, *2 (1993) (stating that parties should use requests for admission to "reach agreements as to facts which are not in dispute"). In this regard, requests for admissions serve to "separate the wheat from the chaff and to get down to the real issues in the case." *Johnson v. Cronlund*, 25 F.R.D. 42, 44-45 (E.D. Pa. 1960). Consistent with this purpose, the request to admit "should be simple and direct so that the answering party in a few words can admit, deny, or explain why it can do neither." 20 Fed. Prac. & Proc. Deskbook § 95 (Wright and Miller).

On the other hand, if they are to achieve their purpose to winnow down issues prior to trial, requests for admission "should not be employed to establish facts that are obviously in dispute." *See Carney v. IRS*, 258 F.3d 415, 419 (5th Cir. 2001). Requests for admissions that seek "half truths" or "contain an isolated bit of truth; but standing alone out of context of the whole truth" are also problematic because such statements "convey unwarranted and unfair inferences." *Beatrice Foods Co.*, 1979 FTC LEXIS 597 *1-2 (1979), *quoting Johnson*, 25 F.R.D. at 44-45. Furthermore, requests for admission that consists of hypothetical facts or facts

unconnected to the facts of the case at hand are improper. *See Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997); *Audiotext Communications Network Inc. v. U.S. Telecom Inc.*, 1995 WL 625744 (D. Kan. 1995). Finally, because requests for admission are intended to save the time of the parties and the court, burdensome requests distort that purpose. *Aspen technology Inc.*, 2003 WL 22926178 (FTC 2003), *citing Wigler v. Electronic Data Systems Corp.* 108 F.R.D. 204, 207 (D. Md. 1985).

B. Respondents Are Not Entitled to an *Order* Compelling Answers to Requests that Lack Relevance to these Proceedings (Requests 8, 9, 24, 27-29)

Requests 8 and 9 each seek admissions that the terms "'Rapid' [and 'Substantial'] can mean different things to different people." Complaint Counsel objected to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32." Consistent with requirement of RULE 3.32, Complaint Counsel explained that:

> The issue in this case is not whether there are multiple reasonable meanings of the term "Rapid" [or "Substantial"]. A respondent can be held liable where multiple interpretations of a claim are possible only one of which is deceptive. Stouffer Foods Corp., 118 F.T.C. at 799; Kraft., Inc. 114 F.T.C. at 120-21 n.8; Thompson Medical, 104 F.T.C. at 789 n.7.

Because the law is clear that Respondents may be held liable if their claims regarding "rapid and visibly obvious fat loss" and "loss of substantial, excess fat" and "substantial weight loss" are deceptive, notwithstanding other reasonable interpretations of these terms, requests seeking admissions that terms "mean different things to different people" are not relevant to these proceedings.

Notwithstanding the clear precedent on this subject, Respondents contend that the

relevancy is "self-apparent" because "[i]mmeasurable terms do not require substantiation." *Third Motion* at 6. In support of this glib contention, Respondents cite portions from two cases discussing puffery, *Bristol Myers*, 102 F.T.C. 21, 321 (1983) and *Sterling Drug*, 102 F.T.C. 395, 749 (1983). *See id.*

As discussed in *Bristol Myers*, puffing claims are those "which are not capable of measurement or which consumers would not take seriously – for example, an advertisement touting a foreign sports care as the "sexiest European." *Bristol Meyers*, 102 F.T.C. at 321. *Sterling Drug* describes puffing claims as "either vague or highly subjective and, therefore, incapable of being substantiated." *Sterling Drug*, 102 F.T.C. at 749.[4]

While it is accurate that "puffing" claims do not require substantiation, the key inquiry is whether Respondents' claims are puffery. Respondents' challenged advertising claims are not mere puffing because they make objective claims as to their products' efficacy. *See Removatron Int'l Corp.*, 1988 F.T.C. LEXIS 165, *17-22 (1988). The advertised claims concern the amount and degree or rate of weight or fat loss rather than the highly subjective or immeasurable claims described in *Bristol Meyers* and *Sterling Drug*.

The following examples illustrate that the claims at issue in the Complaint constitute objective efficacy claims, not mere puffing. Viewed as a whole, Respondents' advertisements regarding its topical gels strongly imply that using the products results in rapid fat loss. For

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[4] Respondents also pose an opaque argument regarding a word that was not the subject of Requests 8 or 9 -- "significant." Respondents pounce upon Complaint Counsel's "unknowing" concession regarding the clarity of the word "significant" when it provided a definition to the phrase "significant shareholders" in an interrogatory. *Third Motion* at 6-7. Suffice to say, the issues in this matter concern Respondents' deceptive advertising claims, not legal definitions included in an interrogatory.

example, as to the claim regarding rapid fat loss, Respondents' ads state that the "Penetrating Gel Emulsifies Fat on Contact." *Compl.* at Exhs. A and B. Moreover, ads state "Just apply Dermalin-APg's transdermal gel to your waist and tummy and watch them shrink in size within a matter of days" and Cutting Gel "dissolves stubborn body fat on contact." *Id.* at Exhs. A and D. As to the claims regarding loss of substantial excess fat, viewed as a whole, advertisements for Anorex and Leptoprin state that the products "dramatically interferes with the process of converting calories to fat" and that "it 'mobilizes' stored fat, moving it out of the fat cell mass" and that it "inhibits the creation of new fat cells." *Id.* at Exhs. I and J. Even stronger, the ads claim that the products have been developed for the "significantly overweight" individuals who need to lose "more than 20 pounds of excess body weight." *Id.* at Exhs. I and J. Viewed as a whole, advertisements for PediaLean strongly imply that the product use leads to substantial weight loss in overweight or obese children. The ads emphasize that use of the product resulted in "significant weight loss in virtually every child studied" and claim that children who used the product "lost an incredible 20% of their excess body weight." *Compl.* at Exhs. K and L.

As demonstrated above, the language used in Respondents advertising is a far cry from puffing. These are not claims containing "immeasurable terms" as Respondent suggests. Hence, this Court should reject Respondents' flimsy rationale for the requested admission. Under settled case law, the issue of whether reasonable consumers could have interpreted the advertisements differently from the interpretations alleged in the *Complaint* is not relevant so long as the claims are deceptive.

Moreover, this request is cumulative or duplicative of past discovery disclosures, and other materials furnished to Respondent. *See, e.g.*, Compl. Counsel's Resp. to Resp't's First Set

of Interrogs., at 7-10 (Aug. 27, 2004) (specifically identifying numerous facts and factors bearing on meaning of phrases "rapid" and "substantial" as alleged in the *Complaint*) (attached in relevant part hereto as Exhibit B).[5] Complaint Counsel has also turned over expert reports and discovery that specifically relate to the use of the terms "rapid" and "substantial" as used in the *Complaint* with reference to Respondents' own advertising. Hence, Complaint Counsel's objections were properly asserted.

Respondents' next requests (24 and 27-29) suffer from similar flaws – they are simply not relevant "to the pending proceedings" as required by RULE 3.32. Request 24 seeks and admission that "what constitutes a 'reasonable basis' changes from case to case." Complaint Counsel objected based upon three grounds, lack of relevance, overbreadth, and because it seeks an admission as to a matter of law. Requests 27-29 concern the appellation used for Howard Beales, former Director of the Federal Trade Commission's Bureau of Consumer Protection, at a congressional hearing concerning dietary supplements for overweight children. Complaint Counsel objected to those requests based upon lack of relevance.

As to Request 24, Respondent argues that the Complaint focuses on several different products and different claims and that they are entitled to discovery as to whether the "reasonable basis standard" is "a static one or shifting." *Third Motion* at 9. They also argue that the request is relevant to their affirmative defenses but fail to explain *how* the requests are relevant.

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[5] Complaint Counsel's response articulated the context by which these words will be evaluated, noting that the "meaning of these terms is conveyed through the net impression of Respondent's ads and the circumstances surrounding those ads." Exh. B at 8. Complaint Counsel's response further described this standard, recognizing that the interpretation of these words depends on "the language used in Respondents' ads, the depictions and visual images, the prominence of certain text, the circumstances surrounding the ad, common usage of terms, the use of juxtaposition, and evidence of intent." *Id.* (citations omitted).

Complaint Counsel has addressed the issue of what constitutes a "reasonable basis" in numerous filings. *See e.g., Compl. Counsel's Opp. to Resp't's Mots. For a more Definite* Statement at 7-8; *Motion to Strike* at 5-8; *Compl. Counsel's Resp. To Resp't's First Set of Interrogs*, at 5-6 (attached as Exh. B); *Compl. Counsel's Opposition to Basic Research's Second Motion to Compel* at 7-9. However, Respondent's request fails to address the facts particular to this case. Instead, it seeks a yes or no answer on a hypothetical "case to case." Similarly, Respondents' requests 27-29 concerning how Howard Beales was addressed at a congressional hearing (he was referred to as Dr. Beales but he is not a medical doctor) bear no relationship to the case at bar. Respondents argue that this "episode. . . ironically underscores the major themes in this case." *Third Motion* at 11. However, the issue presented by the Complaint's allegations against Respondent Mowrey concern whether Respondent Mowrey has held himself out as a medical doctor in a manner that is likely to mislead reasonable consumers under the circumstances. *See F.T.C. Policy Statement on Deception reprinted in Cliffdale Associates*, 103 F.T.C. 110, 174-184. How members of Congress participating in a congressional hearing chose to address the former Director of the Bureau of Consumer Protection is simply immaterial to the issue of whether Respondent Mowrey violated the FTC Act's prohibition against false and deceptive practices.

By their very terms, Requests 24 and 27-29 are not aimed at these proceedings but rather hypothetical other cases, or individuals who are not the subject of the case at bar. The Court has emphasized that "the issue in this proceeding is Respondents' allegedly false and misleading advertising." Order on Complaint Counsel's Motion To Strike Respondents' Additional Defenses (Nov. 4, 2004) at 5. The Court has also recognized that Complaint Counsel should not

be compelled to give a "speculative" response to discovery requests. *See* Order Denying Basic Research's Motion to Compel (Nov. 4, 2004). Furthermore, requests for admissions that address hypothetical fact situations are improper, as are requests that do not relate to the facts of the case at hand. *See Abbott v. United States*, 177 F.R.D. 92, 92-93 (N.D. N.Y. 1997). Respondents' arguments fail to grapple with the reality that their requests are simply immaterial to this matter. As a result, no *Order* compelling different answers is warranted.

C. Respondents Are Not Entitled to an *Order* Compelling Different Answers to Requests that Relate to Defenses Stricken by the Court (Requests 25, 26)

Requests 25 and 26 seek admissions related to Respondents' conspiracy theory that the FTC delayed filing its *Complaint* based upon the date of a congressional hearing on children's dietary supplements. Complaint Counsel objected based upon lack of relevance to the pending proceedings and the vagueness and ambiguity of certain terms used the requests. Respondent asserts that these requests are pertinent because they concern "whether the FTC's [sic] proceeded against the Respondents in the public interest" and whether the FTC "had made the requisite reason to believe determination." *Third Motion* at 9. The Court recently struck the pertinent defenses asserted by respondents' including the defenses that were proffered as the bases for these requests – namely Respondents' "Reason to Believe and Public Interest" defenses as well as Respondents' "APA Unreasonable Delay" defense. *See* Order on Complaint Counsel's Motion To Strike at 4-6. As a result, the slender reed supporting Respondents' irrelevant requests has now been removed and the Court should reject Respondents' motion as it relates to these requests.

D. Respondents Are Not Entitled to an *Order* Compelling Different Answers to Requests for Admissions on Legal Issues (Requests 22, 23)

The plain language of RULE 3.32 governing requests for admissions and the pertinent case law both clearly state that requests for admissions on questions of law are improper and objectionable. Nevertheless, even after Complaint Counsel conferred with counsel for Respondents and discussed this point, Respondents chose to pursue these requests. Request 22 seeks an admission that the "Federal Trade Commission defines, in each case, the substantiation needed to constitute a reasonable basis for the Challenged Advertising." Request 23 seeks an admission that "in the case of specific establishment claims, the only substantiation required of the advertiser is the substantiation specifically referenced by the advertiser in the advertisement."

Complaint Counsel properly objected to these requests because they sought an admission as to a matter of law and also because they lacked relevance to these proceedings. As to Request 22, Respondents argue that they require an answer to prepare their defenses. *Third Motion* at 7. Respondents also attempt to recast their request as seeking information on the law as applied to the facts of this case *i.e.*, "whether the FTC *defined* the substantiation needed with respect to the Challenged products." *Third Motion* at 8. However, that is not the language that Respondents used in their Request: "Admit that the Federal Trade Commission defines, in each case, the substantiation needed to constitute a reasonable basis for the Challenged Advertising." The language of this request is clearly not tied to this specific matter ("the FTC *defines* in *each* case" *not* "the FTC *defined* in *this* case"). Instead, Request 22 seeks information on a matter of law and hence is not the proper subject for a request for admission. *See Williams v. Krieger*, 61 F.R.D. 142, 144 (S.D.N.Y. 1973).

Request 23 serves as an even stronger example of a request as to a matter of law. Respondents admit that they seek information on what "FTC precedent appears to hold" and "confirmation of the standard FTC [sic] is applying against the Respondent." *Third Motion* at 8-9. Again, however, Respondents did not make they request for which they seek to compel a different answer. They could have asked Complaint Counsel to admit that it was applying a certain standard to the precise establishment claims referenced in their own challenged advertisements (or the advertisements attached as exhibits to the Complaint). Instead, they asked Complaint Counsel for an admission about hypothetical establishment claims posed by unidentified advertisers. Respondent seeks a admissions as to what constitutes the law on general topics. Respondents could have phrased these requests to seek admissions pertinent to *specific* claims at issue in these proceedings but they elected not to do so. As a result, the requested admission is both improper and not relevant to the pending proceedings. Accordingly, the Court should reject Respondents' request for a different answer to Requests 22 and 23.

E. Respondents Are Not Entitled to an *Order* Compelling Different Answers to Requests for Admission that Complaint Counsel has already Answered Adequately (Requests 38-39)

Respondent's move to compel better answers to Requests 38 and 39 regarding the definition of "competent and reliable scientific evidence" because it purportedly needs further "clarification" and "factual detail" concerning the meaning of these terms. *Third Motion* at 12. Request 38 sought an admission that the FTC "has not defined 'competent and reliable scientific evidence' to require any specific kinds, types or amounts of scientific studies." Request 39 sought an admission that FTC "has not defined 'competent and reliable scientific evidence' to require any specific testing or research protocol or controls." Complaint Counsel objected to

these requests because they sought an admission as to a matter of law, and also asserted objections based upon lack of relevance to the pending proceedings. Complaint Counsel readily admitted that the FTC has defined "competent and reliable scientific evidence" in the *Notice Order* attached to the *Complaint* as "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective matter manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."

Respondents are not satisfied with this answer and assert that Complaint Counsel has not addressed the matter raised in the request. However, Respondents requested admissions typify the statements containing "an isolated bit of truth" frowned upon by the Commission and the Federal Courts. *See e.g., Beatrice Foods Co.*, 1979 FTC LEXIS 597,*1-2 (1979); *Johnson*, 25 F.R.D. at 44-45 (E.D. PA 1960). The Federal Trade Commission has defined this term in a specific manner set forth in its Notice Order. Respondents' proffered requests for admission are devoid of context and perspective. Accordingy, Complaint Counsel should not be compelled to provide a different answer when the answer given is proper and the request itself is objectionable.

CONCLUSION

This Court should reject Respondent's renewed effort to obtain discovery on topics that are either immaterial to whether they engaged in false and deceptive advertising or improper under RULE 3.32. Certain requests at issue in Respondents' *Third Motion* relate to defenses stricken by the Court and others pose hypothetical situations that are not related to the case at bar. The *Third Motion to Compel* presents another refrain in Respondent's ongoing effort to engage Complaint Counsel in time consuming disputes and divert resources and attention away from the real issue in this case— whether Respondents violated the FTC Act. For the foregoing reasons, Complaint Counsel respectfully request that the Court deny Respondent's *Motion to Compel.*

Respectfully submitted,

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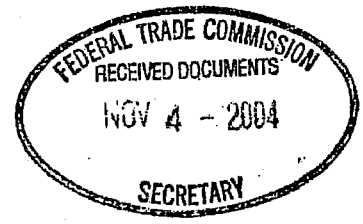
November 24, 2004

Exhibit A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
BASIC RESEARCH, LLC	)	
A.G. WATERHOUSE, LLC	)	
KLEIN-BECKER USA, LLC	)	
NUTRASPORT, LLC	)	
SOVAGE DERMALOGIC LABORATORIES, LLC	)	
BAN, LLC d/b/a BASIC RESEARCH, LLC	)	
OLD BASIC RESEARCH, LLC,	)	Docket No. 9318
BASIC RESEARCH, A.G. WATERHOUSE,	)	
KLEIN-BECKER USA, NUTRA SPORT, and	)	
SOVAGE DERMALOGIC LABORATORIES	)	
DENNIS GAY	)	
DANIEL B. MOWREY d/b/a AMERICAN	)	
PHYTOTHERAPY RESEARCH LABORATORY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	

ORDER ON COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENTS' ADDITIONAL DEFENSES

I.

On August 20, 2004, Complaint Counsel filed a motion to strike Respondents' additional defenses ("Motion"). On September 10, 2004, Basic Research, L.L.C.; A.G.Waterhouse, L.L.C.; Klein-Becker USA, L.L.C.; Nutrasport, L.L.C.; Sovage Dermalogic Laboratories, L.L.C.; Ban, L.L.C., (collectively the "Corporate Respondents"); and Dennis Gay; Daniel B. Mowrey; and Mitchell Friedlander (collectively "Respondents") filed their opposition ("Opposition"). On September 28, 2004, Complaint Counsel filed its reply. On October 28, 2004, as directed by the Court, both parties filed supplemental briefs (Supp.) in order to adequately address the issues raised by the motion to strike.

II.

Complaint Counsel moved to strike the additional defenses alleged in Respondents' Answers on the grounds that the defenses do not satisfy the fact pleading requirement of Rule 3.12(b); that the defenses are invalid and untenable as a matter of law; and that the defenses are irrelevant and immaterial, serving only to needlessly compound and confuse the issues. Motion at 1. Respondents contend that motions to strike defenses are disfavored; that the defenses are not unrelated or immaterial to this proceeding; and that Complaint Counsel has not identified any undue prejudice to them as a consequence of the issues raised by Respondents' Answers.

III.

The Commission's Rules of Practice do not specifically provide for motions to strike, but the Commission has held that under appropriate circumstances such motions may be granted. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 137, at *2 (Sept. 14, 2000); *In re Warner-Lambert Co.*, 82 F.T.C. 749 (Mar. 2, 1973). However, motions to strike are generally disfavored. *In re Dura Lube Corp.*, 1999 FTC LEXIS 251, at *1 (Aug. 31, 1999); *In re Home Shopping Network, Inc.*, 1995 FTC LEXIS 259, at *4 (July 24, 1995).

In *Dura Lube*, it was noted that "Commission precedent varies greatly on the appropriate standard for granting a motion to strike. Some cases have held that issues of law or fact which are irrelevant or immaterial can be resolved on a motion to strike, and other cases have held that it is inappropriate to resolve issues of law or fact on a motion to strike." 1999 FTC LEXIS 251, at *2 (citations omitted). The standard that was articulated in *Dura Lube* was that "a motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues or by imposing a burden on Complaint Counsel." 1999 FTC LEXIS 251, at *4-5; *see also Hoechst Marion Roussel*, 2000 FTC LEXIS 137, at *3.

Respondents' defenses primarily challenge the Federal Trade Commission ("FTC") substantiation policy for dietary supplement and weight-loss claims. However, the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act's prohibition against false and misleading advertising. The FTC's policy statement therefore does not control the outcome of the case and is not the standard against which Respondents' claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases. *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995); *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 493, n.1 (5th Cir. 2004); *Newman v. Boehm, Pearlstwin & Bright, Ltd.*, 119 F.3d 477, 481 n.2 (7th Cir. 1997); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir. 1985). With this background, the various defenses will be addressed in turn.

Fifth Amendment Due Process

Complaint Counsel argues that Respondents' due process defense is not a valid affirmative defense to allegations that Respondents violated the FTC Act; Respondents have fair notice of the Commission's substantiation standard; Respondents' notice or vagueness argument is invalid as a matter of law; Respondents are being afforded due process through these proceedings; the Commission may regulate Respondents' conduct by adjudication without violating due process; and Respondents' due process challenge is unripe, improper, and conflicts with the weight of Commission precedent. Motion at 4-11; Complaint Counsel's Supp. at 10-15.

Respondents argue that due process is a valid defense; a Fifth Amendment defense to this administrative proceeding has been raised properly; and Complaint Counsel's Fifth Amendment argument has no merit. Opposition at 5-15; Respondents' Supp. at 17-24. Respondents initially argued that neither the Administrative Law Judge ("ALJ") nor the Commission had the authority to decide some of the issues raised by their defenses and that the motion to strike should be certified to the Commission. Opposition at 10-11. However, Respondents concede in their supplemental brief that "the ALJ may rule on the threshold issue of whether each defense is unmistakably unrelated or so immaterial as to have no bearing on the issues, and whether they prejudice Complaint Counsel by threatening an undue broadening of the issues or by imposing an undue burden." Respondents' Supp. at 12.

It has long been recognized that an agency may proceed by adjudication rather than rulemaking. *Weight Watchers Int'l, Inc. v. FTC*, 47 F.3d 990, 992 (9th Cir. 1994); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir. 1979). Thus, the issue is whether this adjudicatory proceeding violates Respondents' due process rights. Complaint Counsel primarily argues the merits of Respondents' due process defense. At this stage in the proceedings, however, that determination is premature. The question presented by the motion to strike is whether Respondents' defenses are unmistakably unrelated or so immaterial as to have no bearing on the issues and prejudice Complaint Counsel. *Dura Lube*, 1999 FTC LEXIS 251, at *4-5. Due process claims may be relevant to FTC adjudicatory proceedings and have been directly addressed by the Commission. *See, e.g., In re Trans Union Corp.*, 2000 FTC LEXIS 23, at *126-32 (Feb. 10, 2000), *petition for review denied*, 245 F.3d 809 (D.C. Cir. 2001) (finding that the Fair Credit Reporting Act was not unconstitutionally vague). Complaint Counsel has not demonstrated that the due process defense is unmistakably unrelated or so immaterial as to have no bearing on the issues raised by the Complaint and the proposed remedy. Determination of the merits of Respondents' Fifth Amendment due process defense must be deferred until a factual record has been developed. Accordingly, Complaint Counsel's motion to strike the Fifth Amendment due process defense pled by each of the Respondents is **DENIED**.

First Amendment

It is axiomatic that truthful commercial speech is protected by the First Amendment but that the government may limit forms of communication more likely to deceive the public than to inform it. *Central Hudson Gas & Electric Corp. v. Public Services Comm'n*, 447 U.S. 350, 384 (1980); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Prior cases have refused to strike the First Amendment as a defense while other cases have stricken the defense. *Compare Home Shopping Network*, 1995 FTC LEXIS 259, at *1-2 *and In re Kroger Co.*, 1977 FTC LEXIS 70, at *4-5 (Oct. 18, 1977) *with In re Metagenics, Inc.*, 1995 FTC LEXIS 2, at *2-3 (Jan. 5, 1995).

Complaint Counsel argues that Respondents' First Amendment defense should be stricken because the First Amendment does not protect deceptive commercial speech; the First Amendment is not a valid affirmative defense to allegations of deceptive commercial speech; and entry of an Order will not violate the First Amendment. Motion at 11-15. Respondents contend that the First Amendment protects against prior restraints on protected commercial speech; the First Amendment is a valid defense to the FTC's substantiation doctrine; and the Commission's enforcement action against Respondents is unconstitutional and is ripe for adjudication. Opposition at 15-21. Respondents also allege that the ALJ does not have the authority to resolve whether the Commission's regulatory scheme and commercial speech standards violate the U.S. Constitution. Opposition at 16.

While Complaint Counsel is correct that deceptive speech is not entitled to First Amendment protection, Respondents raise the issue of whether the substantiation rules reach truthful commercial speech that would be protected by the First Amendment. Opposition at 19-20. Indeed, the Commission has directly addressed First Amendment defenses in a number of cases. *See, e.g., In re Jay Norris, Inc.*, 91 F.T.C. 751, 854 (May 2, 1978); *In re Rodale Press, Inc.*, 71 F.T.C. 1184, 1229-35 (June 20, 1967). Complaint Counsel has not demonstrated that on these facts the First Amendment defense is unmistakably unrelated or so immaterial as to have no bearing on the issues. Determination of the merits of Respondents' First Amendment defense must be deferred until a factual record has been developed. Accordingly, Complaint Counsel's motion to strike the First Amendment defense pled by each of the Respondents is **DENIED.**

Reason to Believe and Public Interest

Prior to issuing a Complaint, the Commission must have reason to believe that a party has been or is using any unfair method of competition or unfair or deceptive act or practice; and it must appear to the Commission that a proceeding by it would be in "the interest of the public." 15 U.S.C. § 45(b). As previously noted by the Commission:

> it has long been settled that the adequacy of the Commission's "reason to believe" a violation has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not

> be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

In re Exxon Corp., 83 F.T.C. 1759, 1760 (1974). The Commission's reason to believe and public interest determinations may only be reviewed for abuse of discretion or in extraordinary circumstances. *Cotherman v. FTC*, 417 F.2d 587, 594 (5th Cir. 1969); *Hill Bros. v. FTC*, 9 F.2d 481, 484 (9th Cir. 1926); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980).

Complaint Counsel argues that there are no extraordinary circumstances justifying these defenses in this case. Motion at 19. Respondents contend that the Commission's regulatory standards are inherently vague and unconstitutional and therefore the Commission's reason to believe and public interest determinations are inherently suspect. Opposition at 33.

Respondents have not presented facts sufficient to even suggest the extraordinary circumstances necessary to review the Commission's reason to believe and public interest determinations, but rather merely reiterate their objections to the FTC policy. Accordingly, Respondents' defenses pertaining to these arguments are deemed legally insufficient. Moreover, any attempts to discover the Commission's reason to believe and public interest determinations prejudices Complaint Counsel by unduly broadening discovery into improper areas such as the mental process of the Commission. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike the reason to believe and public interest defenses pled by the Corporate Respondents and Mowrey is **GRANTED**.

APA Agency Action

Complaint Counsel argues that Respondents' Administrative Procedure Act ("APA") defenses of improper agency action and arbitrary and capricious agency action are not valid defenses to allegations that Respondents violated the FTC Act. Motion at 15-16. Respondents contend that the Commission's regulatory scheme governing Respondents' commercial speech constitutes final agency action; the defenses are adequately pled; and Respondents' APA defenses bear directly on the Commission's attempt to hold Respondents' liable for allegedly failing to comply with the Commission's substantiation doctrine. Opposition at 21-25.

Respondents indicate that the "gravamen" of their APA defenses "challenge the Commission's regulatory scheme governing dietary supplemental and weight-loss claims." Opposition at 22. However, the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements. Respondents will be permitted to argue an APA violation as it is relevant to the allegations of the Complaint and the proposed remedy. Complaint Counsel has not demonstrated that these APA defenses are unmistakably unrelated or so immaterial as to have no bearing on the issues. Accordingly,

Complaint Counsel's motion to strike the APA defenses of improper agency action and arbitrary agency action pled by each of the Respondents is **DENIED**.

APA Unreasonable Delay

Complaint Counsel moves to strike Respondents' defense that the Commission unreasonably delayed bringing this case for political or otherwise improper reasons. Motion at 17. Complaint Counsel argues that this defense is unsupported by facts and that a four-year investigation is not unreasonable under the circumstances. Opposition at 17-18. Respondents argue that the unreasonable delay defense is proper and that filing of the Complaint was "coordinated and timed with the commencement of Congressional hearings." Opposition at 27. Respondents also argue that the delay has caused the case to become moot as the products at issue are no longer sold. Opposition at 27. However, the FTC may proceed with an adjudication even though the products at issue are no longer marketed. *Diener's, Inc. v. FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974) (*per curium*); *Carter Products, Inc. v. FTC.*, 323 F.2d 523, 531 (7th Cir. 1963). Respondents' defense of delay threatens to unduly broadening discovery into improper areas such as the mental process of the Commission. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike the unreasonable delay defense pled by the Corporate Respondents and Mowrey is **GRANTED**.

Puffery, Lack of Dissemination, Causation, or Interstate Commerce

Complaint Counsel seeks to strike Respondents' defenses of puffery, lack of dissemination, causation, and interstate commerce. Complaint Counsel argues that these defenses are negative defenses which directly deny the allegations of the Complaint and therefore should be stricken because they are not affirmative defenses. Motion at 21. Respondents contend that the FTC Rules of Practice do not limit defenses to FTC enforcement actions to affirmative defenses. Opposition at 34. Because these defenses directly deny the allegations of the Complaint, the defenses are not irrelevant or immaterial and will not broaden the issues or impose a burden on Complaint Counsel. Accordingly, Complaint Counsel's motion to strike the puffery defense pled by the Corporate Respondents and Mowrey, the lack of dissemination defense pled by Mowrey and Friedlander, and the lack of causation and lack of interstate commerce defenses pled by Mowrey is **DENIED**.

Laches and Equitable Estoppel

Complaint Counsel seeks to strike the laches and equitable estoppel defenses, arguing that equitable defenses cannot be asserted in a case brought by a government agency to enforce an Act of Congress on behalf of the public. Motion at 22. Respondents assert that laches and equitable estoppel are available to defendants in proceedings instituted by the Federal government under appropriate circumstances. Opposition at 35.

The equitable defenses of laches and equitable estoppel generally cannot be asserted against the government when the government is acting in the public interest. *United States v. Summerlin*, 310 U.S. 414, 416 (1939); *United States v. Phillip Morris Inc.*, 300 F. Supp.2d 61, 65 (D.D.C. 2004). Although there may be exceptions to this general rule, *see Phillip Morris*, 300 F. Supp.2d at 70, 74 n.17, Respondents Mowrey, Friedlander, and Gay have not demonstrated any exceptional circumstances that would justify departure from the general rule. Moreover, allowing this defense would impose a burden on Complaint Counsel by unduly broadening the scope of discovery and issues involved in the case. Accordingly, Complaint Counsel's motion to strike the laches and equitable estoppel defenses pled by Mowrey and Friedlander and the laches defense pled by Gay is **GRANTED**.

Inherently Unfair Complaint Allegations and Personal Bias

Respondent Friedlander alleges inherently unfair complaint allegations and personal bias on the part of former FTC Chairman Timothy J. Muris. Freidlander's Answer at 8-10. Complaint Counsel argues that this defense should be stricken as immaterial, impertinent, or scandalous. Motion at 23-24. Respondents contend that Friedlander's vagueness and personal bias defenses are relevant to the reason to believe and public interest determinations. Opposition at 38. The inherently unfair complaint allegations defense merely reiterates arguments ruled on in the July 20, 2004 Order Denying Motions for More Definite Statement and Motion to Dismiss the Complaint for Lack of Definiteness. In addition, as discussed above, the reason to believe and public interest determinations are irrelevant and immaterial and prejudice Complaint Counsel by threatening to unduly broaden discovery. Accordingly, Complaint Counsel's motion to strike the inherently unfair complaint allegations and personal bias defenses pled by Friedlander is **GRANTED**.

Denial of Preamble

Complaint Counsel seeks to strike the Corporate Respondents' denial of the preamble statements regrading reason to believe and public interest. The Corporate Respondents stated in their Answers that "[w]ith respect to the first paragraph of the Complaint, [the Respondent] denies that the Commission has reason to believe that Respondents have violated the provisions of the [FTC Act] and/or that this proceeding is in the public interest." Answers at 2. Accordingly, Complaint Counsel's motion to strike the denial of the preamble pled by the Corporate Respondents is **GRANTED** for the reasons set forth above regarding the reason to believe and public interest defenses.

IV.

As set forth above, Complaint Counsel's motion to strike Respondents' additional defenses is **GRANTED in part and DENIED in part.**

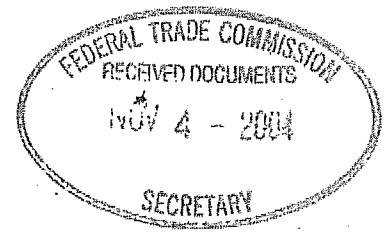
The parties are reminded that allowing these defenses is not an open invitation to needlessly confuse and compound the issues, increase the scope of discovery, or prolong these proceedings. *Dura Lube*, 1999 FTC LEXIS 251, at *5. The "mere fact that respondent alleges a matter as an affirmative defense does not necessarily open the door to unlimited discovery." *In re Ford Motor Co.*, 1976 FTC LEXIS 38, at *2 (Dec. 3, 1976). Pursuant to Rule 3.31(c), discovery shall be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to any pending defenses. 16 C.F.R. § 3.31(c)(1). Once the factual record is established, the merits of Respondents' defenses may be addressed.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 4, 2004

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
	)	
BASIC RESEARCH, LLC	)	
A.G. WATERHOUSE, LLC	)	
KLEIN-BECKER USA, LLC	)	
NUTRASPORT, LLC	)	
SOVAGE DERMALOGIC LABORATORIES, LLC	)	
BAN, LLC d/b/a BASIC RESEARCH, LLC	)	
OLD BASIC RESEARCH, LLC,	)	Docket No. 9318
BASIC RESEARCH, A.G. WATERHOUSE,	)	
KLEIN-BECKER USA, NUTRA SPORT, and	)	
SOVAGE DERMALOGIC LABORATORIES	)	
DENNIS GAY	)	
DANIEL B. MOWREY d/b/a AMERICAN	)	
PHYTOTHERAPY RESEARCH LABORATORY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

ORDER DENYING BASIC RESEARCH'S MOTION TO COMPEL

I.

On September 10, 2004, Respondent Basic Research, L.L.C. ("Respondent") filed a motion to compel ("Motion"). On September 16, 2004, Respondent filed a Notice of Correction withdrawing one section of its Motion. On September 23, 2004, Complaint Counsel filed an unopposed motion for extension of time to file its opposition seeking an extension from September 27, 2004 to October 4, 2004. On October 4, 2004, Complaint Counsel filed its opposition to the Motion ("Opposition").

Complaint Counsel's motion for an extension is **GRANTED**. Upon consideration of the briefs and attachments, and for the reasons set forth below, Respondent's motion to compel is **DENIED**.

II.

Respondent seeks an order compelling Complaint Counsel to provide more complete answers to Respondent's First Set of Interrogatories. Motion at 1. Respondent identifies six interrogatories that it contends have not been answered completely and argues that Complaint Counsel's general objections are insufficient. Motion at 5-15. Complaint Counsel contends that it fully responded to each of the interrogatories and that Respondent has failed to demonstrate the circumstances necessary to breach the various privileges asserted. Opposition at 7-22.

III.

A.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1); *see FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2). The privileges regarding non-testifying experts, work product, and deliberative process are raised by Complaint Counsel.

Commission Rule 3.31(c)(4)(ii) provides that a party may discover facts known or opinions held by an expert who is not expected to be called as a witness "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." 16 C.F.R. § 3.31(c)(4)(ii). The party seeking discovery from a non-testifying retained expert faces a heavy burden. *Hoover v. Dep't of Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). Mere assertion that exceptional circumstances exist, without providing any facts in support of this contention, is not sufficient to compel the disclosure of nondiscoverable documents. *Martin v. Valley Nat'l Bank of Arizona*, 1992 U.S. Dist. LEXIS 11571, *13 (S.D.N.Y. 1992).

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Work product that reveals attorney client communications or the attorneys' mental processes in evaluating the communications "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975). This privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Assertion of the deliberative process privileges requires: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. *Hoechst Marion Roussel*, 2000 FTC LEXIS 134, at *9; *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). The deliberative process privilege is a qualified privilege and can be overcome where there is a sufficient showing of need. *In re Sealed Case,* 121 F.3d 729, 737 (D.C. Cir. 1997); *U.S. v. Farley*, 11 F.3d 1385, 1386 (7th Cir. 1993).

B.

Interrogatory 1(b) seeks information regarding "who interpreted the [p]romotional [m]aterial in question" and interrogatory 1(c) seeks information regarding "all extrinsic evidence . . . that was relied upon in determining what representations were conveyed." Motion at 5. Complaint Counsel argues that these persons fall within the deliberative process, non-testifying expert, and work product privileges, and that testifying experts will be identified as provided in the Scheduling Order. Opposition at 9-10. Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 1(d) seeks information regarding the substantiation that Complaint Counsel contends Respondents needed to have a reasonable basis for their representations. Motion at 6-7. Complaint Counsel contends that it answered this question by outlining specific sources of industry guidance, including specific reference to agency statements, Commission Policy Statements, caselaw and other information, including prior orders. Opposition at 11. Complaint Counsel further argues that the interrogatory requires speculation and that Complaint Counsel properly objected, asserting privilege with respect to information involving non-testifying experts, deliberative process, and work product. *Id.* Upon review of Complaint Counsel's Answer it is clear that Complaint Counsel provided an adequate response to the question asked. Complaint Counsel will not be required to provide a more speculative response.

Interrogatory 1(e) seeks information regarding the basis of Complaint Counsel's contention that Respondents did not have a reasonable basis to substantiate their representations. Motion at 8. Complaint Counsel does not respond to this allegation in their Opposition. However, it is presumed that Complaint Counsel intended its general objections and arguments raised regarding similar interrogatories to apply to this interrogatory. In addition, in reviewing Complaint Counsel's response to this interrogatory, Complaint Counsel raises the objections that

the interrogatory seeks information prepared in anticipation of litigation; protected by the deliberative process privilege; protected by the non-testifying witness privilege; and that expert witness materials would be provided at the appropriate time. Opposition, Attachment A at 6. In addition, Complaint Counsel responds that "the evidence submitted by Respondents does not amount to competent and reliable scientific evidence . . . ." *Id.* Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 2 seeks information regarding Complaint Counsel's analysis of the substantiation provided by Respondent. Motion at 9. Complaint Counsel argues that this question seeks the identity and opinions rendered by non-testifying experts; seeks prematurely the identity and opinions of expert witnesses; seeks information prepared in anticipation of litigation and attorney work product; seeks information protected by the deliberative process privilege; and is unduly burdensome. Opposition at 14. Complaint Counsel represents that Respondent provided over 284 different studies, analyses, and tests for the ephedra products alone. *Id.* Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 3 seeks identification of all market research or other evidence that is potentially relevant to determining consumer perceptions of Respondent's advertising. Motion at 10. Complaint Counsel responds that this interrogatory calls for expert opinions; that information related to testifying experts will be disclosed as required under the scheduling order; and that Complaint Counsel is not aware of any market research at this time. Thus, it appears that Complaint Counsel has provided a full and complete response to this interrogatory. Respondent has not identified any basis to overcome the privileges claimed to this overly broad interrogatory. Moreover, use of an interrogatory to undermine the schedule established for the production of expert reports is not appropriate.

Interrogatory 4 seeks the Commission's definition of the terms: visibly obvious, rapid, substantial, and causes. Motion at 11. Complaint Counsel argues that Respondents are presumed to understand the meaning of the words used in their advertising; additional information will be provided when expert discovery is provided; and the more than two single-spaces pages of responses to the interrogatory are sufficient. Reviewing Complaint Counsel's response along with their objections, it is clear that Complaint Counsel provided a sufficient response, including general objections, general comments, and over a single-spaced page providing facts regarding these four terms. *See* Opposition, Attachment A at 9.

Interrogatory 5 seeks information about materials provided to persons unaffiliated with the Commission, including information provided to the United States House of Representatives. Motion at 13. Complaint Counsel answered the interrogatory, disclosing that copies of the advertisements and Livieri study were disclosed but not provided to the minority and majority

counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations. Motion at 13-14; Opposition at 18. Respondent argues that the response is incomplete because it fails to "identify the persons" to whom such information was provided. Motion at 14. This argument is without merit – the persons to whom the material was disclosed have been provided.

Interrogatory 6 seeks information regarding why the Complaint was not filed prior to June 16, 2004. Motion at 14. Complaint Counsel argues that this information is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. Respondent's defense regarding delay has been stricken and the interrogatory is not relevant to any pending issues in the case. Moreover, the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file the Complaint. *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772 (D. Del. 1980); *In re Exxon Corp.*, 1981 FTC LEXIS 113 (Jan. 19, 1981).

IV.

For the above-stated reasons, Respondent's motion to compel is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 4, 2004

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	Docket No. 9318
BAN, L.L.C.,	)	PUBLIC DOCUMENT
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 3.35 of the Commission's Rules of Practice, Complaint Counsel serve the following answers to Respondent Basic Research LLC's First Set of Interrogatories ("Respondent's Interrogatories").

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's interrogatories to the extent they seek information which may be derived or ascertained by Respondents from documents or information already in Respondents' possession. Interrogatories are properly used to obtain information not otherwise available for the requesting party to analyze, not to "require a party in such discovery proceeding to do his adversary's work for him by compiling lists or other information . . . for him." *Berg v. Hoppe*, 352 F.2d 776, 779 (9th Cir. 1965).

2. Complaint Counsel object to Respondent's interrogatories to the extent they seek information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultants or agents, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3). *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of

Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).

3. Complaint Counsel object to Respondent's interrogatories to the extent they seek information protected from disclosure by the deliberative process privilege. *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).

4. Complaint Counsel object to Respondent's interrogatories to the extent they seek information relating to the expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order Pursuant to Rule 3.21(c). *Schering Corp.*, No. 9232, Order re Interrogatories and Request for Production of Documents (Feb. 6, 1990); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).

5. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information relating to non-testifying expert witnesses because Respondent has not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). *Schering Corp.*, No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *Telebrands Corp.*, No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information, (Dec. 23, 2003).

6. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information obtained from or provided to other law enforcement agencies, and to the extent that they seek information obtained in the course of investigating other marketers of dietary supplements and weight loss products, on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest.

7. Complaint Counsel object to Respondent's interrogatories to the extent that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.

8. Complaint Counsel object to each of Respondent's interrogatories to the extent they seek information that is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent, in violations of the limits of discovery set by Rule 3.31(c)(1).

9. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of any Pretrial Scheduling Order.

10. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.

11. Complaint Counsel object to Respondent's interrogatories to the extent they seek information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.

2. The fact that Complaint Counsel have answered or objected to any interrogatory or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such interrogatory or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any interrogatory in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any interrogatory.

3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to Respondent's interrogatories. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

4. As used herein, "Respondents" shall mean all Respondents named in the Complaint.

5. As used herein, "Respondent's interrogatories" shall mean the interrogatories and all applicable instructions and definitions as set forth in Respondent's interrogatories.

Interrogatories and Responses

INTERROGATORY NO. 1 [Respondent's Interrogatory No. 1a, b, and c]

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

a) state whether you contend that the representation was express or implied;
b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed; and
c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed

Response:

Complaint Counsel object to the extent that Respondent has included as many as five separate interrogatories under this one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Complaint Counsel's responses are numbered according to the actual number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice (General Objection 9).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that its Complaint alleges that Respondents have represented the claims at issue "expressly or by implication" and that information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 2 [Respondent's Interrogatory No. 1d]

With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

d) describe the nature, quantity, and type of substantiation that you contend Respondents needed in order to possess and rely upon a reasonable basis to make the representation

Response:

Complaint Counsel object to the extent that Respondent has included as many as five separate interrogatories under this one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Complaint Counsel's responses are numbered according to the actual number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice (General Objection 9).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the Commission and its staff have provided guidance to the industry about how the agency evaluates scientific substantiation for health-related advertising claims. The Commission's 1998 Dietary Supplement Guide, for example, provides a detailed analysis of how the agency evaluates scientific substantiation related to advertising claims for dietary supplements. Section II.B. of the guide describes basic principles about the amount and type of evidence required to support a health-related claim; how to evaluate the quality of that evidence; the importance of considering the totality of the evidence rather than individual studies in isolation; and how to evaluate the relevance of the evidence to a specific advertising claim and product. Other sources of industry guidance include: the FTC's Substantiation Policy Statement, appended to *Thompson Medical Co.*, 104 F.T.C. at 839 (1984); the Commission's Enforcement Policy Statement for Food Advertising; and a body of FTC case law, including *Pfizer, Inc.*, 81 F.T.C. 23 (1972) (articulating the factors that determine what level of substantiation is appropriate); *Schering Corp.*, 118 F.T.C. 1030 (1994) (ALJ's Initial Decision and consent order) (assessment of substantiation for weight loss and appetite suppressant claims for Fibre Trim supplement); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (assessment of substantiation for weight loss supplements). Complaint Counsel further state that the guidance provided by the Commission through its opinions, cease and desist orders, consent decrees, complaints, and publications provide additional notice and guidance regarding the appropriate

type and level of substantiation for the advertising claims challenged in the *Complaint*. These documents are available to the public in the official FTC reporter and/or the agency's website.

INTERROGATORY NO. 3 [Respondent's Interrogatory No. 1e]

With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

e) describe the factual basis for your contention that Respondents did not possess and rely upon a reasonable basis that substantiated the representation

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice.

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the evidence submitted by Respondents does not amount to competent and reliable scientific evidence typically required by Commission jurisprudence to support claims relating to health or safety. Complaint Counsel further state that information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 4 [Respondent's Interrogatory No. 2]

For each study, analysis, research, or test provided to you by any Respondent as substantiation for representations made concerning the Challenged Products during your investigation leading to the Complaint, please state whether you contend such study, analysis, research, or test does not constitute adequate substantiation for the representation for which it was asserted, and describe the basis and circumstances under which you made that determination, including without limitation the identity of the person who made the determination, when they made it, their qualifications to make such a determination, and the factual basis and reasoning underlying that determination.

Response:

Complaint Counsel object to this Interrogatory because it seeks the identity of and opinions rendered by non-testifying experts (General Objection 5). Complaint Counsel further

object to this interrogatory to the extent that it seeks prematurely the identities of and opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4). Complaint Counsel further object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel (General Objection 2) and information protected from disclosure by the deliberative process privilege (General Objection 3). Moreover, to the extent it seeks a separate answer for each study, analysis, research, or test provided by Respondents, Complaint Counsel object to the extent that it is unduly burdensome (General Objection 7).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the evidence submitted by Respondents as substantiation for representations made concerning the Challenged Products does not constitute adequate substantiation. Complaint Counsel further state that additional information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 5 [Respondent's Interrogatory No. 3]

> Please identify all Market Research or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made by Respondents in Promotional Materials for the Challenged Products.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel (General Objection 2). Complaint Counsel further object to this interrogatory to the extent that it seeks prematurely the opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4) and opinions rendered by non-testifying experts (General Objection 5).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that any responsive information will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 6 [Respondent's Interrogatory No. 4]

> What does the Commission mean by the terms "visibly obvious," "rapid," "substantial," and "causes" as those terms are used throughout the Complaint?

Response:

Complaint Counsel object to this Interrogatory to the extent it seeks information which may be derived or ascertained by Respondents from documents or information already in Respondents' possession (General Objection 1). Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2) and information protected from disclosure by the deliberative process privilege (General Objection 3). Complaint Counsel further object to this interrogatory to the extent that it seeks prematurely the opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4) and opinions rendered by non-testifying experts (General Objection 5).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel respond:

First, to the extent that Respondents have used the terms "visible," "rapid," "cause," and "substantial" in promotional materials for their products, including products that are not the subject of the Complaint, Respondents are presumed to have understood the meaning of these words. Complaint Counsel anticipates that Respondents themselves possess considerable information regarding the meaning of these terms and that discovery will generate further information pertinent to the meaning of Respondents' ads.

Second, Complaint Counsel state that the meaning of these terms is conveyed through the net impression of Respondents' ads and the circumstances surrounding those ads. The Commission has recognized that "[w]hether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it." *Kraft Inc.*, 114 F.T.C. 40, 122 (1991) quoting *Thompson Medical*, 104 FTC 648, 790 (1984). As a result, the Commission would focus on, among other things, the language used in Respondents' ads, the depictions and visual images, the prominence of certain text, the circumstances surrounding the ad, common usage of terms, the use of juxtaposition, and evidence of intent. Complaint Counsel is still gathering information on these issues through the discovery process and reserves the right to supplement this answer as further information becomes available.

Nevertheless, regarding certain language in the ads as it relates to the meaning of the terms "visibly obvious," "rapid," "substantial," and "causes," Complaint Counsel reiterate their discussion of these issues in their previous filing. Respondents' advertisements contain the terms referenced in this interrogatory and analyzed as a whole, the ads themselves present a "net impression" conveying the meaning of the terms used in the Complaint.

The ads and packaging for Respondents' topical gels convey the net impression that these products will cause rapid and visibly obvious fat loss in areas of the body to which it is applied.

This net impression is based, among other things, upon the language of the marketing materials and their depictions and visual elements. The ads superimpose images of lean and/or muscular models along with bold text conveying messages such as "Penetrating Gel Emulsifies Fat On Contact" and "Penetrating Gel for the Visible Reduction of Surface Body Fat" and "Dissolves Surface Body Fat On Contact." Compl. Exhs. A, C, D. The ads also state: "apply Dermalin-APg's transdermal gel to your waist or tummy and watch them shrink in size within a matter of days"; and that applying Cutting Gel "to your glutes, biceps, triceps, or lats, and the fat literally melts away . . ." Compl., ¶13E. The net impression of these advertisements is that fat loss will be fast or quick, or as the Commission stated in the Complaint, "rapid." The word "rapid" is a characterization of the collective words used by Respondents. Similarly, the term "visibly obvious" is a term used to summarize the claims made by Respondents in their promotional materials. Again, Respondents themselves use the term "visible" in their own advertisements. For example, "[s]ee visible results in approximately 19 days, guaranteed" (Compl., ¶13F). Moreover, the net impression of the ads lead one to believe that the consumer will actually see the results with their own eyes, thus making it "visibly obvious." For example, Respondents' ads claim the user can usually get the "desired results" in "about 10 days" proclaiming that in large letters: "Fact Get CUTTING GEL today! You will see the difference (and so will everyone else)!; "FACT Cutting Gel Reduces Surface Fat and Exposes the Toned Muscle Beneath!" Compl. Exhs. D-E. The Derrmalin ad states that "Dermalin-APg permits you to spot reduce. Put it on around your thighs - slimmer thighs. Over thirty and getting thick around the middle? Just apply Dermalin-APg's transdermal gel to your waist or tummy and watch them shrink in size within a matter of days" (Compl., ¶13A); and "Put Cutting Gel in a culture dish with fat cells and you can literally watch them deflate - similar to sticking a pin in a balloon" (Compl., ¶ 13D). These elements of the ads, among others, convey and reinforce the impression that the fat loss caused by these products will be rapid or quick, and noticeable or visibly obvious.

The term "substantial" is also used in Respondents' marketing materials. For example, the Leptoprin and Anorex ads query "if substantial, excess body fat is adversely affecting your health and self-esteem, then it's time for you to discover Leptoprin [Anorex]." Compl. Exhs. I and J. The Leptoprin commercial also uses "before" photos of testimonialists juxtaposed with their then-current images in connection with their statements claiming the loss of 50, 60 and 147 pounds. Compl. Exhs. H-H1. Both ads also refer to "significantly overweight" people. Compl. Exhs. I and J. These terms are strikingly similar to one another. Taken together, along with other elements in the ads, these depictions and statements convey and reinforce the impression that the product will cause the loss of substantial excess fat. In the PediaLean ads, Respondents claim that "in a well-controlled double-blind clinical trial, each and every child who used PediaLean as directed lost a significant amount of excess body weight" (¶36B of the Complaint). "Substantial" is a term or synonym of terms that Respondents used to promote the efficacy of their products.

The Complaint's use of the word "cause" is consistent with the net impression of Respondents' promotional materials. The thrust of the advertisements is that if one uses Respondents' product, it will have a certain effect. For example, Respondents have represented

that by using the topical gels, the end result is that the consumer will have visibly obvious fat loss in a fast amount of time. All of these terms are used in their common sense parlance and are based on the representations made in Respondents' own promotional materials. Further discovery may produce testimony, documents, information, additional ads and draft ads for these same products and other ads by Respondents which use these same terms. Such evidence would also be relevant to the issue of the meaning of these terms.

The Commission may also examine extrinsic evidence to corroborate its conclusions regarding ad meaning, even if a facial analysis of the ads themselves is a sufficient basis to conclude that the ad conveys the claim. *See Stouffer Foods Corp.*, 118 F.T.C. 746, 798-804. If the Commission turns to extrinsic evidence to determine the meaning of an ad, the evidence can consist of "expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation." *Cliffdale Associates* & Deception Statement, 103 F.T.C. at 174, 176 n.8; *Thompson Medical*, 104 F.T.C. at 790. As a result, to the extent Complaint Counsel chooses to present extrinsic evidence in the form of expert testimony to determine the meaning of any ads, further information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 7 [Respondent's Interrogatory No. 5]

> Identify all documents or other materials provided by Respondents to the Commission during the pre-complaint investigative stage of the above-captioned case which the Commission has disclosed or otherwise provided to persons unaffiliated with the Commission (including but not limited to persons working for, on behalf of, or otherwise affiliated with the United States House of Representatives) and identify the persons to whom they were given.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31c)(1) (General Objection 9). Complaint Counsel further object to the extent that this Interrogatory seeks information protected from disclosure by the deliberative process privilege (General Objection 3) and information obtained from or provided to other law enforcement agencies on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest (General Objection 6). Complaint Counsel further object to the extent that this Interrogatory seeks information relating to non-testifying expert witnesses (General Objection 5) and information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that, pursuant to Rule 4.11(b) of the Rules of Practice and Section 21 of the FTC Act, copies of advertisements for Pedialean and the Livieri study were disclosed but not provided to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations. Although Respondents provided copies of Pedialean advertisements and the Livieri study to Complaint Counsel, Complaint Counsel also obtained copies of these materials independently. Complaint Counsel provided PediaLean packaging to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations after the Complaint was issued, and such packaging was returned.

INTERROGATORY NO. 8 [Respondent's Interrogatory No. 6]

Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1) (General Objection 9) and is protected from disclosure by the deliberative process privilege (General Objection 3).

Dated: August 27, 2004

Respectfully submitted,

Laureen Kapin (by Taylor)

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Bureau of Consumer Protection
Federal Trade Commission
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2004, I caused *Complaint Counsel's Memorandum in Opposition to Basic Research LLC's Third Motion to Compel* to be served and filed as follows:

(1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-113
Washington, D.C. 20580

(3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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